IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRANCE FOWLER, Petitioner	:	
	:	
v.	:	Case No. 14-151 Erie
	:	
JON FISHER, et al., Respondents	:	

OBJECTIONS TO REPORT AND RECOMMENDATION

TO THE HONORABLE SENIOR DISTRICT JUDGE TERRANCE F. McVERRY:

The Petitioner, Terrance Fowler, files the instant Objections to Magistrate Judge Susan Paradise Baxter's Report and Recommendation (R&R), and requests that this Court overrule those findings as clear error of law, and make new findings. In support thereof, Petitioner avers the following:

Introduction

The Petitioner would like to incorporate the Reply to Respondents Answer ("Reply") he filed with the magistrate judge as if fully set forth herein. Petitioner will be frequently referring to that filing within the instant Objections. Both parties concur as to the factual history. Petitioner will be addressing the claims objected to, in the same sequence as addressed in the R&R for this Court's convenience.

PROPERLY ADMITTED EVIDENCE AT TRIAL

Petitioner asserts that heretofore, the evidentiary picture has been obscured as to the properly admitted evidence introduced at his trial. Claims **two** and **three** were denied for basically the same reasons by the Pennsylvania Superior Court and Magistrate Judge Susan Paradise Baxter. Aside from the inadmissible evidence in claims two and three, reasonable jurists would not disagree whether or not the state had sufficient evidence to convict.

As to the state of the law presently, the State would not have been able to prove the elements necessary to convict. For example, the State's only eyewitness, Bruce Wagner, testified that he viewed Petitioner from a second story apartment window through glasses.[1] He mistakenly identified Petitioner's father as Petitioner's accomplice. He testified that he was as sure as his identification of Petitioner's accomplice [Dixon] as he was of Petitioner. He was mistaken. Excluding Wagner's identification testimony at trial and Detective Adam Digilarmo's testimony about the firearm found in Petitioner's bedroom, the following evidence would have been before the jury.[2]

> a) Bruce Wagner's testimony that he observed a car parked down the street from the jewelry store and two men jumped in the car and minutes later he heard on his police scanner a robbery of a jewelry store. He then gave police the license plate number of that car.

1. Wagner never testified that he saw the two men go into the jewelry store or come out. He assumed that these two men were the perpetrators.

2. Notably, this case was continued several times at the preliminary hearing, and each time, according to Wagner, he was informed that

b) testimony that Petitioner was in possession of the green car that was allegedly seen near the scene of the jewelry store robbery.

c) testimony that Officer Valez found a silver certificate near where the green car was parked.

The above evidence [a,b,c] would have been insufficient to convict. As noted infra, presence at the scene of the crime, knowledge of a crime, is not sufficient as a matter of law to convict, without more. Reasonable jurists would not debate that the Pennsylvania Superior Court decision denying relief was an unreasonable application of clearly established Supreme Court law. And reasonable jurists would not debate that the state court's decision was not an unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. §2254 (d)(1)-(2).

a. Claim One

Petitioner contends that the magistrate judge erred when evaluating the facts concerning this claim. James Fowler's testimony established that Petitioner left the morning of July 7, 2010, before nine, and did not leave again until the police had arrived. Reply at 10-12. Any inconsistencies should have been left for the jury.

Moat importantly, the magistrate failed to consider counsel's actions. In opening and closing arguments, counsel emphasized the testimony of James Fowler. In fact, he informed

---

Petitioner was the guy. This highlights that without Wagner, the State's case would have been nonexistent.

the jury that "and that by itself can create reasonable doubt in your mind....." N.T. 7/15/11, at 81; Reply at 12.

In reviewing this claim, the Superior Court, as well as the magistrate judge, failed to consider the totality of counsel's actions. Alibi was counsel's defense, not proving that defense actually works to the clients detriment. Reply at 14. The Superior Court "nip-picking" about minor inconsistencies to deny this claim should not be a deterrer for this Court to correct this blatant error.

The question for this Court is simple, would counsel continue to argue the alibi, if indeed, he thought that it was not proven? After the alibi testimony from James Fowler, counsel informed the court that he would not be calling any additional witnesses. Petitioner's Reply at 13-14.

In sum, an evidentiary hearing should be held to determine counsel's strategy. Petitioner was diligent in seeking to develop this claim in state court, but was thwarted. See Palmer v. Hendricks, 592 F.3d 386, 392 (3d Cir.2010); see also Williams v. Taylor, 529 U.S. 420, 435 (2000). All arrows point to alibi as counsel's defense. However, to Petitioner's deteriment, he failed to request an alibi instruction.

b. Claim Two

In addressing this claim, the magistrate erred in several areas of the law. First and foremost, the magistrate admitted that there was no evidentiary hearing held to explain why counsel did not move to suppress Wagner's in-court identification, which Wagner admittedly gave after he saw Petitioner on the television news in handcuffs. R&R at 13-14.

Second, the magistrate erred by failing to acknowledge that an evidentiary hearing was never held in the state court despite the state obligation to do so. See Commonwealth v. Cope, 518 A.2d 819 (Pa.Super.1986)(once counsel is deemed to be ineffective for failingto file pre-trial motion to suppress evidence, the relief to be awarded is the right to challenge the questioned evidence in an evidentiary hearing). See Reply at 19.

Third, the magistrate failed to acknowledge that under prevailig precedent, without Wagner's identification, the state would not have been able to convict without more.[3] Under Pennsylvania law, evidence of a defendant's association with the perpetrator of the crime, or knowledge of the crime cannot establish an unlawful agreement. See Commonwealth v. Murphy, 844 A.2d 1228, 1238 (Pa.2004); Jackson v. Virginia, 443 U.S. 307 (1979); see also Reply at 18.

Based on the evidence presented at Petitioner's trial, the following evidence would have been before the jury excluding Wagner's identification of Petitioner: (1) Petitioner admitting that he was in possession of a car that was near the crime scene;

3. The state did not postpone Petitioner's preliminary hearing (5) times and each time inform Wagner that Petitioner was the guy if Wagner wasn't the crux of their case. Had they had other evidence, surely they would have used it to get the case to trial. It only takes a prima facie showing at the preliminary hearing to get a case held over for trial.

(2) Wagner identifying Petitioner's car via license plate; (3) a certificate allegedly found near where the green car was parked.[4]

In this country, never has being near a crime scene been sufficient to prove an individual guilty. Even being present and knowing about a crime doesn't make one guilty. Murphy, supra. This is what the law says and the jury are instructed to follow the law. Furthermore, Wagner **never** saw the two men leave out the jewelry store, he assumed that they came from the jewelry store. Never once did Wagner testify that he could view the jewelry store from his residence. His testimony only establishes that Petitioner's car was near a crime scene and Petitioner, by his standards was acting suspicious. That's it!

Again, excluding Wagner's in-court identification, the evidence would have been **legally** insufficient to prove Petitioner guilty. Therefore, reasonable jurists would not disagree that the Superior Court's decision was unreasonable in light of the facts, and in light of Strickland.

Critical to the inquiry of this claim is the Supreme Court's decision in Oneal v. McManinch, 513 U.S. 432, 435 (1995). In that case, the court held, if the judge is in grave doubt as to whether the error effected the trial, then the Petitioner must prevail.

In evaluating this claim, it would be hard to legally state that without Wagner's unreliable identification, Petitioner would

4. The wind could have blown the certificate down the street, or the real robbers could have dropped it. The certificate would not have been enough to convict Petitioner.

have been convicted of this senseless crime. Petitioner has maintained his innocence from the date of his arrest. He had nothing to hide in admitting he was in possession of the car seen near the crime scene. Again, being near a crime scene does not imply guilt.

Another key point that the state Superior Court and the magistrate ignored, is that Katie Peterson testified that Petitioner dropped his daughter off at the day care, the day of the crime around 9:30 a.m. See Reply at 6. This corroborates Petitioner's innocence. No where does no court mention this evidence. It is widely acknowledged that eyewitness identification is so unreliable.

c. Claim Three

In addressing this claim, the magistrate overlooked key aspects of the record.[5] First and foremost, this wasn't no fleeting reference to a shotgun as the Superior Court reasoned. The detective testified that "there was two live shells in it, and then packaged them up." Moreover, the state trial judge who presided over the trial stated this evidence was prejudicial. The problem was the jury already heard the evidence and considered it. You can't put ink in a glass of milk and then remove it. A curative instruction was imperative.

Again, the Superior Court unreasonably applied the evidence

5. The magistrate states in her R&R that Petitioner "contends that the Superior Court's conclusion was wrong." R&R at 16. No where did Petitioner ever use the word wrong. This is untrue.

presented in the state court to deny Petitioner relief. As discussed above in claim two, the evidence was tenuous at best. Our Third Circuit has already spoken on the circumstances presented in this case. See United States v. Himmelwright, 42 F.3d 777 (3rd Cir.1994)(introduction of evidence that a defendant possessed a firearm in the course of a prosecution of that defendant for unrelated threats has been found to be error of such profoundly prejudicial quality that it compels reversal of a conviction).

In light of Himmelwright, how isn't Petitioner entitled to relief? Aside from Bruce Wagner's unduly suggestive in-court identification, the evidence presented by the detective was the only other damaging evidence [propensity evidence]. Counsel could not have had no reasonable strategy for not requesting a curative instruction. Counsel knew the evidence was highly prejudicial as alluded to by the trial judge. This is why counsel objected to it. Reply at 2-23.

Reasonable jurists would not disagree that the Pennsylvania Superior Court unreasonably applied Strickland.

d. Claim Four

The magistrate failed to appreciate the state of the law. As highlighted in Petitioner's Reply, particular state law rights can be so important that a lawyer can be held to have violated the Sixth Amendment right to effective assistance of counsel for failing to protect state law rights at trial or pre-trial. Reply at 23-24. Petitioner would like to incorporate that argument as if fully set forth within.

In Kloiber, the Supreme Court of Pennsylvania held:

> Where the witness is not in position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions.....the court should warn the jury that the testimony as to identity must be received with caution.

Commonwealth v. Kloiber, 106 A.2d 820, 826-827 (Pa.1954)

Eyewitness identification has been scientifically proven to be unreliable. In considering the totality of the circumstances in this case here, no reasonable jurists would disagree that trial counsel should have requested a Kloiber charge. The state court record show that [Wagner] was not positive as to his identification of Petitioner. At the preliminary hearing, he identified Petitioner's father as his accomplice. And testified at that same hearing that he was as sure as his identification of Petitioner's accomplice as he was of Petitioner. Petitioner's accomplice charges were dropped.[6]

Contrary to the magistrates' findings "the state court decision denying this claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

6. Wagner admitted that the preliminary hearing was postponed five (5) times and everytime he was told that Petitioner was the guy charged. If this is reliable identification, then what is unreliable. Are system is truly broken to allow this injustice to occur.

Harrington, 562 U.S. at 103.

CONCLUSION

For the reasons stated in Petitioner's Reply to Respondents Answer, and the argument stated herein, Petitioner respectfully hopes and prays for the following relief:

a) the magistrate findings be overruled and new findings made

b) an evidentiary hearing convened

c) granting of the writ

d) relief this Court deem appropriate

Respectfully submitted,

[signature]

CERTIFICATE OF SERVICE

I, Terrance Fowler, hereby certify that the following [Objections] document was forwarded upon the party below via U.S. first class mail:

Erie County district Attorney's Office
140 W. Sixth Street, Suite 506
Erie, PA 16501

Date: December 11, 2015

Terrance Fowler, KF-4317
SCI @ Smithfield
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

Mr. Terrance Fowler [KF-4317]
SCI @ Smithfield
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

December 11, 2015

Clerk
United States District Court
Western District of Pennsylvania
17 South Park Row
Erie, PA 16501

RE: 14-151 Erie

Dear Clerk:

Enclosed please find a copy of the Objections I filed in the above reference matter. A copy has been forwarded to the Judge in this case [Senior district Judge Terrence F. McVerry, and the Respondents.

Thank you for your time and consideration in this matter.

Sincerly,

Terrance Fowler

TF
CC;file
ENCLOSURES